

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

ALBERT NICOLAS, #635504	§	
VS.	§	CIVIL ACTION NO. 6:10cv661
PAM PACE, ET AL.	§	

ORDER OF DISMISSAL

The above-entitled and numbered civil action was heretofore referred to United States Magistrate Judge Judith K. Guthrie. Plaintiff's entire complaint is based on his contention that when he filed a Step 1 grievance regarding the psychological testing that Defendant Dingas proposed to do, Defendant Pace responded in part that Defendant Dingas is a "licensed psychologist and very competent to administer test and perform counseling." *See* Complaint at 10 (Step 1 grievance). This misstatement of Mr. Dingas's professional status was corrected in the response to Plaintiff's Step 2 grievance: "Mr. Dingas has a Master of Education Degree, he is a Licensed Professional Counselor and a Staff Psychotherapist." *Id.* at 12. On this basis, Plaintiff filed his lawsuit contending that the Defendants conspired to "tamper" with a government record with intent to harm and defraud him, pursuant to Tex. Penal Code § 37.10. He later added Defendant Lowe, an Anderson County Assistant District Attorney, because he did not pursue the matter in the manner Plaintiff wished. The Report and Recommendation of the Magistrate Judge, which contains proposed findings of fact and recommendations for the disposition of such action, concludes that this civil rights action should be dismissed as frivolous and for failure to state a claim upon which relief may be granted pursuant to 28 U.S.C. § 1915A(b)(1) and because the 42 U.S.C. § 1983 action is time-barred. The Plaintiff has filed written objections (docket entry #11).

In his objections, he simply refers to his Motion to Amend his original complaint (docket entry #8), which he filed on March 28, 2011.¹ Although he has the right to amend his complaint as a matter of course under certain conditions, *see* Fed. R. Civ. P. 15(a), he has not submitted an amended complaint for filing. His Motion to Amend includes certain arguments that he wishes to add piecemeal to his original complaint, which does not constitute a complete amended complaint. The arguments that he does assert in his motion do not address the substance of the Magistrate Judge's Report and Recommendation. Furthermore, he seeks to add a voluminous section of the Texas Department of Criminal Justice's Grievance Manual to his original complaint. Not only is this filing unnecessary and unhelpful to his argument, but it violates the page limitations of Eastern District of Texas Local Rule CV-3. Therefore, the motion will be denied and its attached document (docket entry #8-1) will be stricken and not further considered. The Court notes that Plaintiff has also filed a Motion to Supplement the Amended Original Complaint (docket entry #12), which he filed after his objections in an apparent attempt to add arguments aimed at re-pleading his complaint to avoid the findings of the Magistrate Judge. Again, he may not supplement his complaint or his purported amended complaint in this piecemeal manner. Moreover, addressing the putative motion as additional objections, the Eleventh Circuit case he cites, *United States v. Fontenot*, 611 F.3d 734 (11th Cir. 2010), does not demonstrate that 18 U.S.C. § 1519 could apply to a misstatement in a response to a Step 1 grievance form, which was later corrected in a subsequent response to a Step 2 grievance. At bottom, he has still only pleaded a state law cause of action in his complaint. Further, he has not demonstrated that the time-bar applicable to § 1983 actions does not foreclose his lawsuit.

The Court has conducted a careful *de novo* review of the pleadings in this case, the Report

¹ In this motion, Plaintiff also seeks to voluntarily dismiss Defendant Lowe and the State of Texas from his lawsuit. Based on the analysis herein, the entire action will be dismissed. The Court notes that the State of Texas was never named as a defendant in the Plaintiff's original or his putative amended complaint.

of the Magistrate Judge, the Plaintiff's objections thereto, and all other documents, and records in the case. Upon such *de novo* review, the Court has concluded that the Report of the Magistrate Judge is correct and that the Plaintiff's objections are without merit. It is accordingly

ORDERED that Plaintiff's objections are **OVERRULED** and the Report of the Magistrate Judge is **ADOPTED** as the opinion of the District Court. It is further

ORDERED that the above-styled civil case be and hereby is **DISMISSED** with prejudice as frivolous and for failure to state a claim upon which relief may be granted pursuant to 28 U.S.C. § 1915A(b)(1) as well as time-barred under the statute of limitations applicable to actions under 42 U.S.C. § 1983. It is further

ORDERED that any and all other motions that may be pending in this civil action are hereby **DENIED**. Finally, it is

ORDERED that the Clerk shall provide a copy of this opinion to the Administrator of the Three-Strikes List for the Eastern District of Texas.

So ORDERED and SIGNED this 19th day of May, 2011.

A handwritten signature in black ink, appearing to read 'Leonard Davis', written over a horizontal line.

LEONARD DAVIS
UNITED STATES DISTRICT JUDGE